

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	
)	4:13CR3121
Plaintiff,)	September 7, 2016
)	12:05 p.m.
vs.)	Lincoln, Nebraska
)	
JOSEPH J. BENZ,)	
)	
Defendant.)	
)	

VOLUME I of I
TRANSCRIPT OF SENTENCING PROCEEDINGS
BEFORE THE HONORABLE RICHARD G. KOPF
UNITED STATES DISTRICT COURT SENIOR JUDGE

A-P-P-E-A-R-A-N-C-E-S:

FOR THE PLAINTIFF:	MR. STEVEN A. RUSSELL Assistant U.S. Attorney 100 Centennial Mall North Suite 487, Federal Building Lincoln, NE 68508
FOR THE DEFENDANT:	MR. ROBERT B. CREAGER Attorney at Law 1630 K Street Lincoln, NE 68508
DIGITAL OPERATOR:	CONNIE SCHULTZ
TRANSCRIBER:	LORI J. SEHNERT General Reporting Service 610 J Street, Suite 20 Lincoln, NE 68508

- - -

Proceedings recorded by digital sound recording, transcript produced
by transcription service.

1 (Wednesday, September 7, 2016, at 12:05 p.m.)

2 THE COURT: Good afternoon. We're on the record now in
3 United States versus Joseph Benz. The case number is 4:13CR3121.
4 The matter comes on for sentencing.

5 Counsel, please remain seated, but now enter your
6 appearance.

7 MR. RUSSELL: Your Honor, please enter the appearance
8 of Steven Russell on behalf of the United States.

9 MR. CREAGER: Judge, Bob Creager, 1630 K Street,
10 Lincoln, for Mr. Benz.

11 THE COURT: And, Mr. Creager, could I ask you to pull
12 that mic closer to you?

13 MR. CREAGER: Is that better, Judge?

14 THE COURT: It is. May I confirm with you, Mr.
15 Creager, that you have discussed the presentence report -- and
16 I'm talking now about the revised presentence report -- and any
17 addendum with your client and have shown him a copy?

18 MR. CREAGER: Yes, Your Honor.

19 THE COURT: That, then, takes me to the presentence
20 report itself. My understanding is that there are no objections
21 to the presentence report, but Mr. Creager has filed a motion for
22 a variance. Is that -- do I have the status of this matter
23 correctly?

24 MR. RUSSELL: Yes, Your Honor. The Government has no
25 objection to the presentence report.

1 THE COURT: You did object to my tentative findings.

2 MR. RUSSELL: Yes. And, quite honestly, Judge, I'm not
3 sure at what point in the proceedings I need to formally object
4 on the record to the vacating of the receipt charge. So --

5 THE COURT: So you herewith object?

6 MR. RUSSELL: I do.

7 THE COURT: And I herewith deny.

8 MR. RUSSELL: And I would also object that there was
9 not -- to the Court's earlier finding that there was not enough
10 evidence of distribution, and I'd just simply do that for the
11 record as well.

12 THE COURT: Thank you. That objection is overruled.

13 Then, back to my original question. There are no
14 objections -- assuming my earlier rulings are what they are, my
15 understanding is no one objects to the presentence report?

16 MR. RUSSELL: That's correct, Your Honor.

17 MR. CREAGER: We filed no substantive objections to the
18 report itself, Your Honor.

19 THE COURT: And like you -- or like the Government's
20 lawyer, you think I heard, when I prohibited you from presenting
21 psychological testimony regarding the knowledge component of the
22 crimes --

23 MR. CREAGER: Correct.

24 THE COURT: -- you thought that you did not have to
25 present an insanity defense in order to present that testimony

1 and I disagree with you, and I presume you renew your objection
2 at this time?

3 MR. CREAGER: Yes. At some point, we'll just have the
4 historical discussion of how we got here in this unusual
5 circumstance, but that's -- yeah, that's part of it. We
6 proceeded on that basis that we had to proceed with the insanity
7 defense.

8 THE COURT: Right. Well, let's do that, then, just a
9 brief summary, and you tell me whether you think I'm wrong. Mr.
10 Benz was charged in a two-count indictment. One count alleged
11 possession of child pornography and the other count alleged
12 receipt and distribution of child pornography. There was a
13 non-jury trial -- well, during the course of the proceedings,
14 prior to the non-jury trial, Mr. Creager asserted that he should
15 be allowed to present psychological testimony -- well, with
16 respect to the question in the statute about knowledge, and I
17 denied that for the reasons that are articulated in the file. I
18 found that the statute -- both statutes did not require that the
19 defendant know that what he was doing was unlawful. In other
20 words, I found there was no specific intent requirement in the
21 relevant statutes.

22 Are you both in agreement with me up to this point?

23 MR. RUSSELL: Yes, Your Honor.

24 MR. CREAGER: Yes. And I think procedurally what
25 happened was, I first gave notice of my intent to offer

1 psychiatric testimony on the question of his knowledge and/or
2 capacity diminished by the effects of the Pramipexole. And we
3 went through a series of motions, and the reports were submitted,
4 and the Court then ruled in -- on the record that the offense was
5 a general-intent crime, not a specific-intent crime, and under
6 Eighth Circuit authority, diminished capacity type evidence,
7 psychiatric testimony on the defendant's intent or state of mind
8 is not relevant or admissible on general-intent crimes. Then we
9 later, in light of Dr. Newring's subsequent analysis, gave notice
10 of the insanity defense.

11 And then, once we did that, we crafted this procedure
12 whereby, to preserve the diminished capacity defense, we would
13 have a bench trial and get at least the evidence on the record of
14 what this drug did or didn't do to Mr. Benz. And so --

15 THE COURT: And, in the interim, Dr. Benz was evaluated
16 at a federal medical center and so we then had a non-jury trial
17 in which we had two extraordinarily good psychologists testify,
18 and I found that Dr. Benz had met one prong of the insanity
19 defense, but not the second prong, which meant that he was guilty
20 of both offenses, and I so found and I articulated in a
21 memorandum and order.

22 After I made that finding, Mr. Creager alerted me to the
23 fact that, because I had also found that the evidence was
24 insufficient on distribution, my recollection is that the program
25 that the Government found operating did not have an on and off

1 switch, unlike LimeWire.

2 Are you with me to this point?

3 MR. CREAGER: Yes, Your Honor.

4 MR. RUSSELL: Yes, Your Honor.

5 THE COURT: Okay. So Mr. Creager suggested that I had
6 the power and the obligation to vacate one of the crimes, because
7 the Eighth Circuit had held that if you have a possession crime
8 and a receipt crime, they are essentially the same, and you can't
9 punish somebody twice for the same conduct.

10 Then the question became which finding of guilty should be
11 vacated? If I vacated the possession crime, that left the
12 receipt crime in place, which, in turn, triggered the statutory
13 minimum sentence of 60 months. I looked very hard at the law and
14 concluded that I have the discretion to vacate the greater or the
15 lesser in terms of penalty. For reasons which I've articulated
16 earlier, I vacated the greater, which means that Mr. Benz would
17 be found guilty of one crime and that will be the --

18 Is that Count 1, Mr. Russell?

19 MR. RUSSELL: It's Count 2, Your Honor.

20 THE COURT: -- Count 2 of the Indictment, and not Count
21 1, because they're the same crimes.

22 After that, I ordered a presentence report. It was
23 conducted and submitted. Mr. Creager filed his variance motion.
24 I issued tentative findings in which I gave the parties notice
25 that I independently was contemplating a variance to probation.

1 The Government, in turn, objected to my tentative findings in a
2 timely fashion, and that, then, I think, is a fair summary of
3 where we stand today.

4 Do you all agree?

5 MR. RUSSELL: Yes, Your Honor.

6 MR. CREAGER: Yes, Judge.

7 THE COURT: Okay. So, Mr. Creager, can we take up your
8 variance motion at the time of allocution?

9 MR. CREAGER: Yes, Judge, that would be the best way to
10 handle it.

11 THE COURT: In order to do that, what I must first do
12 is calculate the advisory guidelines. We have a total offense
13 level of 27 and a criminal history category of one. The
14 guideline range is 70 to 87 months in prison. The supervised
15 release range is five years to life. The defendant is ineligible
16 for probation under the guidelines, but is eligible for probation
17 under the statute. Probation range is one to five years under
18 the statute. The fine range in this case is \$12,500 to \$125,000.
19 There are three restitution claims here totaling \$77,500, and a
20 special assessment of \$100 is required.

21 Counsel, have I accurately stated the advisory guideline
22 ranges -- well, let me back up. There's also a forfeiture in
23 this case that must be imposed and that's one Apple MacBook
24 laptop; a Sabrent external hard drive, 250GB; a 500GB external
25 Sabrent hard drive; and one Black Cruzier 4GB flashdrive. Now,

1 have I accurately stated the correct advisory guideline
2 calculations and related information?

3 MR. RUSSELL: Yes, Your Honor, with one exception.
4 Yesterday, I received a fourth victim restitution request that I
5 sent to the Court by email, along with Mr. Creager and Mr.
6 Holder. I have a copy of it if the Court wishes to look at it.

7 THE COURT: Well, isn't it too late?

8 MR. RUSSELL: Well, I just want to make sure, if I
9 received it, I sent it to you as soon as I received it, and I did
10 that.

11 THE COURT: When did you send it?

12 MR. RUSSELL: I sent it yesterday to Kopf@ned.courts.
13 I'm not sure if that's the right --

14 THE COURT: That's not my direct email. That's -- I'm
15 not being critical of you.

16 MR. RUSSELL: Yeah.

17 THE COURT: You may or may not know. I have a personal
18 email and I have a Kopf email, where everything in the world
19 dumps into it; proposed orders. I've not seen it, I don't
20 think --

21 MR. RUSSELL: I have a copy.

22 THE COURT: -- so, let me take a recess. We'll go pull
23 up that email.

24 MR. RUSSELL: I also have a copy of it here in court,
25 if the Court wishes --

1 THE COURT: Oh, do you? If you want to, give it to me.

2 MR. RUSSELL: May I approach, Your Honor?

3 THE COURT: Sure. This guy complains about the short
4 notice. When does the restitution notices go out?

5 MR. RUSSELL: I don't know exactly when they went out,
6 Your Honor. I know that as soon as there was a finding of guilt,
7 we had the other three restitution claims --

8 THE COURT: Yeah.

9 MR. RUSSELL: -- and it's from the same law firm.

10 MR. HOLDER: Your Honor, it's my understanding, in
11 speaking with Kim Roewert, that attorneys are registered with the
12 FBI. The FBI is the agency responsible for obtaining these
13 victim statements.

14 THE COURT: Yeah.

15 MR. HOLDER: So, as soon as there's a case where a
16 victim has been identified, these attorneys are notified. So
17 they're -- it's my understanding that they're notified as soon as
18 their victim -- their client has been identified as a victim in a
19 case.

20 THE COURT: Well, that would've happened long ago.

21 MR. HOLDER: That's my understanding of the procedure,
22 Your Honor.

23 THE COURT: Well, I'm inclined to say it comes too
24 late. I mean, we're in the middle of sentencing. And I'm not
25 being critical of you. I'll leave the bench here in a minute

1 and -- you say it came to Kopf -- the Kopf email?

2 MR. RUSSELL: Yeah. I sent a copy to Mr. Creager. He
3 has his copy. And I bet it happened yesterday between 1:00 and
4 two o'clock in the afternoon.

5 THE COURT: We were somewhat busy yesterday dealing
6 with the Beatrice 6 case, so it's possible that -- I don't see
7 it. Would've been in the afternoon, you say?

8 MR. RUSSELL: I believe so. I sent the same email to
9 Mr. Creager and to Mr. Holder.

10 MR. HOLDER: My email was time stamped at 2:21, Your
11 Honor.

12 THE COURT: Thank you, J.R.

13 Nope, I didn't get it in my personal email. If you don't
14 mind, I'll take a break and we'll call up the other one and find
15 out, so I can confirm on the record that I rec- -- that one of my
16 email accounts received it. But I'm inclined to deny this. I
17 mean, Mr. Holder, our probation officer, tells me that the claim
18 that -- given the short time between the notice of the
19 defendant's sentencing -- I mean, if these people are notified
20 even before sentencing by the FBI -- and this is Jessica --

21 Do you know anything about Jessica?

22 MR. RUSSELL: I mean, I -- just so the Court's clear, I
23 know the Jessica series is a well-known series. I know that it
24 is on file with the Department, that information. That
25 information is in -- as soon as there is a conviction -- I know,

1 at least as soon as there is a conviction, victims who have been
2 identified are notified and that comes through our victim witness
3 coordinator. So, the other three victims submitted material --

4 THE COURT: Long ago.

5 MR. RUSSELL: Yes. And, like I say, I got this
6 yesterday and immediately forwarded it on, I thought, to you and
7 to the attorneys.

8 THE COURT: Well, if I deny this, then I've got to make
9 a report to Congress, literally, but I'm -- which I don't care.
10 Let me go check. I'll check to see if we got it.

11 MR. RUSSELL: If you don't mind, Judge, I'll go down to
12 my office and get the sent email so that you know exactly when I
13 sent it.

14 THE COURT: Well, then you can make a record -- you can
15 tell the Marsh Law Firm that I just said it came too late
16 and -- but you made a record for them. And I suppose they
17 can -- there's a question about jurisdictionally what they can
18 do, but that's their problem. But I don't want the record to be
19 unclear, so why don't you do that and I'll go do it. We stand in
20 recess.

21 (Off the record.)

22 THE COURT: Please be seated. We're back on the
23 record.

24 Counsel, at 2:21 p.m., my email -- there's no secret about
25 this, it's in the local rules or available on the net,

1 Kopf@ned.uscourts.gov, received a forwarded email -- well,
2 received an email addressed to Judge, Bob, and J.R. It says, "I
3 just received the restitution request on the Jessica Series.
4 Please let me know if you have any questions. Thanks, Steve."
5 And he attaches "Mr. Russell from" some lawyer in New York, and
6 then the letter. So, I didn't see it yesterday. First time I
7 saw it is when I came to court just now. I'll mark this as
8 Court's Exhibit No. 1 and receive it into evidence unless there's
9 an objection.

10 MR. RUSSELL: No objection, Your Honor. The only thing
11 I'm concerned about, when I sent that to you, I had not checked
12 to see whether it should've been redacted. So, I would ask that,
13 for the purpose of this hearing, it be --

14 THE COURT: Sealed?

15 MR. RUSSELL: -- marked as a restricted document, yeah.

16 THE COURT: You want it sealed or restricted?

17 MR. RUSSELL: Restricted, I think, would be fine.

18 THE COURT: Okay. It'll be -- the exhibit is
19 restricted. Did you clarify the procedure when you were down
20 there, when you went back to your office?

21 MR. RUSSELL: I did not, Your Honor. I was checking to
22 make sure about the timeline with respect to the email, but I do
23 know what the procedure is and --

24 THE COURT: Can you think of anything why these folks
25 couldn't have responded earlier?

1 MR. RUSSELL: Not when the other three did. I mean,
2 that's the concern I have, is, I don't know why -- because
3 everyone who is listed on that report -- on the NCMEC -- the
4 National Center for Missing and Exploited Children prepares a
5 report. When we get that, we -- I don't know what the right term
6 is -- cross-match it with victims who are in a database of the
7 Department of Justice. They are sent notices. My guess -- and
8 we see this in a couple of cases. It's not like this is unusual
9 that we may have -- we'll have two different cases that both have
10 the Vicky Series. One case there'll be a request for restitution
11 and one case there will not. And a lot of that is the internal
12 procedures within their own law offices, where some will hit and
13 some will not. I can't tell you why this one was sent to me the
14 day before the sentencing. I just know that as soon as it was, I
15 sent it up to you just to be on the safe side because I think I
16 have the obligation to do that. So, that's -- I mean, I don't
17 mean that in a --

18 THE COURT: No.

19 MR. RUSSELL: -- I just mean I wanted to make sure that
20 you had the request as soon as I received it.

21 THE COURT: No. You did -- the only thing you
22 have -- and I don't mean this in any way as a criticism, but you
23 have access to my -- what I'll call my real email, my day-to-day
24 email, and on something like this --

25 MR. RUSSELL: Quite honestly, Judge, I should've

1 checked that. I just clicked "Kopf" and I thought I hit every
2 email that I -- in my system.

3 THE COURT: I'm not being critical. I understand why
4 you did it and you notified me. I mean, I -- it just matters how
5 fast I can react.

6 Okay. I'm going to deny the Jessica request from the Marsh
7 Law Firm for two reasons. Number one, it comes far too late.
8 And, number two, it's insufficient. It makes a bunch of
9 statements -- it's a well-written memorandum, but it hasn't got
10 any supporting data that -- there's a letter from the mother. It
11 doesn't have anything about -- no detail about money, about how
12 the child is getting along. Apparently, she's now 17. The law
13 firm says, "We have not yet had the opportunity to retain experts
14 and prepare formal forensic or damage reports." Well, that's not
15 my problem. They want a 60-day continuance. Apparently, they
16 are asking for it one day prior to the sentencing hearing, and I
17 don't think that's fair to Dr. Benz to delay sentencing anymore.
18 So, I'm denying it for two reasons: one, it came too late; two,
19 it's insufficient; and I therefore reject it.

20 Do you want any further ruling, Counsel?

21 MR. RUSSELL: No, Your Honor.

22 THE COURT: Okay, thanks.

23 So, let's go back so the record is clear. We have a 27-1.
24 Custody range is 70 to 87 months. Five years to life, supervised
25 release. The defendant is ineligible for probation under the

1 guidelines, but not the statute. Fine range is \$12,500 to
2 \$125,000. There's a total amount of restitution requested in the
3 sum of \$77,500, and I'll get to the specific -- well, just for
4 the record, those victims are the Vicky Series, the Sarah Series,
5 and the Casseaopeia Series. And the special assessment is \$100.
6 There's a forfeiture required, as I've indicated earlier.

7 Now, have I stated the correct advisory guideline
8 calculations and related information given my ruling?

9 MR. RUSSELL: Yes, Your Honor.

10 MR. CREAGER: Yes, Judge.

11 THE COURT: I have prepared a sentencing summary that
12 I'll have counsel -- pardon me, I'll have the CRD hand out
13 to -- one to Mr. Russell, two to Mr. Creager, one to the
14 probation officer, and then I'll hear the parties on allocution.
15 I'll give you an opportunity to read it and then you can address
16 it during your allocution.

17 Are you ready, Counsel?

18 MR. RUSSELL: Yes, Your Honor.

19 THE COURT: Let me hear from the Government.

20 MR. RUSSELL: Well, obviously, Your Honor, we object to
21 the imposition of a term of probation rather than a term of
22 imprisonment. We believe that a term of probation in this case
23 does violate the tenants of 3553 --

24 THE COURT: Which one?

25 MR. RUSSELL: -- in that there is no pers- --

1 THE COURT: Which one?

2 MR. RUSSELL: -- there is no grounds for a variance.
3 Specifically, Your Honor, with respect to the physical condition
4 of the defendant, I do understand that the defendant suffers from
5 a number of medical conditions. However, that's not a
6 determining factor in varying downward from the sentencing
7 guidelines.

8 THE COURT: But that --

9 MR. RUSSELL: This is a unique -- I'm sorry, Your
10 Honor.

11 THE COURT: But that's not the only reason for the
12 variance.

13 MR. RUSSELL: Well, I think I should -- for the record,
14 I should separate them out and then we can talk about them
15 together.

16 THE COURT: Okay.

17 MR. RUSSELL: But, with respect to the physical
18 condition, the reason why I don't believe that it is a proper
19 grounds for variance of any magnitude in this case is because
20 this is a case where the defendant has spent time in a Bureau of
21 Prison setting. He did not have a problem with being in --

22 THE COURT: Oh, he fell.

23 MR. RUSSELL: But, Your Honor, I understand he fell,
24 but I think that the determination of the Bureau of Prisons was
25 that they could --

1 THE COURT: He lacerated his head, didn't he?

2 MR. RUSSELL: -- they could accommodate his -- yeah.
3 Well, I mean, it's not -- he's not going to be the first or the
4 last prisoner who has a problem at a medical center with either
5 falling or having a concern. What I'm saying is, I think that
6 the Bureau of Prisons was able to adequately deal with that.
7 There is no -- there was no determination that there was a
8 problem with his physical condition as it currently exists that
9 they can't take care of it. I'm not saying that things will
10 never happen, but I'm saying that for purposes of a downward
11 departure, that is not an appropriate grounds solely for a
12 downward departure or, quite honestly, Your Honor, even in
13 combination with other factors.

14 The second ground that the Court has is that the defendant
15 would not have committed this crime but for taking this drug. I
16 don't agree with that. I don't think that's what the evidence
17 shows. And, quite honestly, I don't think that's even what the
18 Court's determination was when the Court found the defendant
19 guilty of receipt that the Court's now vacating. Because you
20 can't look at this crime at the time -- in a context anything
21 other than a continuum. Whether you say he wouldn't have started
22 downloading child pornography, the 21,000 images of child
23 pornography that we have, whether you say he wouldn't have
24 started that at some point -- you even indicate he understands
25 the wrongfulness of his actions. He knows what he is doing is

1 wrong and he continues to do what you say he knew was wrong. So,
2 you can't, in isolation, say, "Well, he wouldn't have done this
3 crime but for the Mirapex," but on the other hand, he would've
4 continued the crime because that's exactly what happened here.
5 Whether we want to get to the sentence of probation, the facts
6 show that he knew what he was doing was wrong. He never, ever
7 told the doctor about what he was doing. He knew it was wrong
8 and he continued to do it. And so when the Court says you want
9 to vary because he would not have done this, you're negating all
10 of the factors that indicate that he knew it was wrong and he
11 continued to do it.

12 THE COURT: No. I can -- I said that he was acting
13 like a vigilante, that he knew that he was seeing child
14 pornography, and there was a reason for him acting as a
15 vigilante, and I can go into that in detail if you care to. But
16 it's -- the drug manufacturer warns people that if you take this
17 stuff, you will engage in compulsive behaviors, including online
18 gambling, which occurred in this case, crazy spending, which
19 occurred in this case, and hypersexuality, which occurred in this
20 case. Now, there is no evidence that Benz was doing anything
21 illegal prior to his ingestion of Mirapex. Isn't that right?

22 MR. RUSSELL: That's right, Your Honor. He was not
23 uncovered -- he was not discovered by law enforcement until --

24 THE COURT: Until after --

25 MR. RUSSELL: -- yeah, until after 2007.

1 THE COURT: Until after he was on Mirapex.

2 MR. RUSSELL: Yes.

3 THE COURT: Yeah. So, I've concluded that, but for the
4 ingestion of Mirapex, he wouldn't have done this.

5 MR. RUSSELL: But my point, Your Honor, is that you're
6 saying he would not have started. I understand that's the point.
7 What I'm saying is that when you say that the drug manufacturer
8 says these are side effects, the next thing the drug manufacturer
9 says is, "If you have these side effects, notify a doctor."

10 THE COURT: Right.

11 MR. RUSSELL: He didn't do it. He continued to --

12 THE COURT: Well, that's hardly surprising given the
13 nature of the drug.

14 MR. RUSSELL: No, no. Judge --

15 THE COURT: The reason they have the warning for the
16 doctors is because people on this drug -- as a matter of fact, if
17 you look further at the literature, doctors are told that they
18 will not -- many of them will not recognize their symptomology.

19 MR. RUSSELL: Because, Your Honor -- that's my point.
20 Because, if I like to gamble and I got on Mirapex, I may gamble
21 more. I understand that. If I have -- if I spend, if I shop,
22 and I'm on Mirapex and I shop more than I have before, doctors
23 are made aware of that. What I'm saying here, in this case, is,
24 what Dr. Benz did was, he did something that you just now said,
25 "The Government couldn't prove he did it before this." Well, so

1 this is totally out of the nature of anything that ever happened
2 to him.

3 THE COURT: Right.

4 MR. RUSSELL: And now, all of a sudden, he
5 continues -- he doesn't notify a doctor and he continues this
6 activity. I think that puts him more in the context of somebody
7 who knows what he's doing is wrong and continues to do it. And,
8 in 3553, what the Court is asked to consider is how the nature of
9 this -- character of this offense occurred. And here what you
10 have is a person who not only -- I mean, Judge, it's
11 just -- there's so many inconsistencies here. You're
12 saying -- not you, but I mean the evidence in this case is that
13 Dr. Benz not only just downloaded stuff to -- as a vigilante, he
14 also moved the stuff to other hard drives.

15 THE COURT: Sure.

16 MR. RUSSELL: You can't say that, Judge. You can't say
17 that he moved it to other hard drives because he wanted to
18 continue vigilante work. He moved it to a thumb drive that we
19 found at the University of Nebraska at Kearney. That is not
20 consistent with a person who is merely trying to look for and do
21 vigilante work. That's -- I'm sorry, that's totally
22 inconsistent. And what I'm saying is, when you look at varying
23 from a 70-month sentence that Congress believes, even under 3553,
24 the Court has to consider significantly different. I just don't
25 believe the continuum of this offense is significantly different

1 that warrants a probationary sentence. I understand the Court
2 saying, "You should vary" -- I mean, look, I have to acknowledge
3 the guidelines are here. I have to acknowledge that I think the
4 guideline sentence is appropriate. But I will indicate to the
5 Court, I understand the Court varying, because even Dr. Boutwell
6 says that there is some inhibition of self-control. I mean,
7 there is a lessening of the -- there is a lessening of
8 self-control, but that does not warrant a sentence of no term of
9 imprisonment. You should sentence Dr. Benz to a term of
10 imprisonment, whether it be the 32 months that Probation
11 recognizes or a higher sentence, which is what the Government
12 would recommend. To not impose a term of imprisonment, I
13 believe, is wrong. I believe that is contrary to what the
14 prescripts of 3553 talk about, both in nature of the offense, the
15 recommendation for deterrence. I think all of those things are
16 taken into account and I will simply leave it at that.

17 THE COURT: With respect -- I'll take your two last
18 points in reverse order. With respect to deterrence, I do not
19 need to be overly concerned with the general deterrence here
20 because this case and the utilization of Mirapex for a person
21 with MS and RLS is unique, and the number of other people who
22 would be generally deterred is vanishingly small.

23 Secondly, with regard to specific deterrence, there is
24 absolutely no reason to believe that once the doctor got off
25 Mirapex, he is likely to re-offend. With respect to the nature

1 and circumstances of the offense, there is no doubt that the
2 defendant was hoarding child pornography. The compulsion, the
3 hypersexuality, however you want to describe it, is a product of
4 the drug. And your argument that he should've recognized that,
5 "My inhibitions are substantially diminished" flies in the face
6 of the medical science. People on this drug frequently do not
7 know that their inhibitions are substantially lowered. And I'm
8 persuaded that had he not taken Mirapex, and had he not had MS
9 and RLS, that this crime wouldn't have been committed. That,
10 coupled with the fact that there's no question that he's
11 substantially physically impaired, suggests to me that a variance
12 to probation is entirely justified.

13 Do you have anything you'd like to add?

14 MR. RUSSELL: There is no study that Dr. Newring
15 provided that says that a person of -- when we talk about
16 hypersexuality, most of the cases that Dr. Newring talked about
17 were cases where a person has sexual -- I mean, people like sex,
18 and people would do something in addition to the sex. There is
19 no study that says that people on Mirapex start looking at child
20 pornography, that -- matter of fact, there was no study that even
21 said that. So, the idea that the Government is doing something
22 totally outside the science, there was no science about it,
23 Judge. There's no science that says, "You're going to start
24 taking -- you're going to start looking at child pornography."
25 And my point is, when you're talking about hypersexuality, I

1 understand hypersexuality. This is something so totally
2 inconsistent that when doctors ask you, "Are you having any
3 problems?" and you say, "No," knowing that you're doing something
4 that you believe is so totally inconsistent, that, in and of
5 itself, is a red flag to me. And when you continue to do it -- I
6 mean, you're saying he was hoarding it. Dr. Newring says he
7 wasn't trying to possess it. Dr. Newring says all he wanted to
8 do was receive it so he could discard it as he wanted. But, yet,
9 his actions aren't -- they belie that action. They belie that
10 idea. The idea is that he was trying to keep this stuff. That's
11 the whole point. And so, when you put it on a thumb drive, when
12 you take it with you places, when you put it on hard drives, you
13 are doing things that are not just compulsive in terms of a drug.
14 You are doing things that are compulsive in terms of what you
15 want. You are doing exactly like compulsive gambling.

16 THE COURT: If that were the case, the Government would
17 have evidence that this man downloaded child pornography before
18 he began taking Mirapex.

19 MR. RUSSELL: Well, how do you know that? We -- how
20 would you know if he changed his computer? How would we know if
21 he --

22 THE COURT: What we do know, from everything, is this
23 man's personality completely changed. His president of the
24 faculty said he was a tenured professor. He took his autistic
25 child, who became an eagle scout -- there wasn't anything prior

1 to the taking of Mirapex that would indicate that this man was
2 inclined to do what you say. So, to suggest that the Mirapex
3 wasn't the causative factor -- it may not have been the only
4 causative factor, that gets into all sorts of extraordinarily
5 difficult questions, it seems to me, about what his psychological
6 state was at the time he took the drug. But to suggest that the
7 Mirapex didn't cause this crime is just wrong.

8 MR. RUSSELL: Judge, no. I'm not suggesting that the
9 use of the Mirapex had no effect. I think even Dr. Boutwell will
10 indicate that it had some effect. What I am saying is, when you
11 say that, "For that 2007 to 2009 time frame, this would not have
12 occurred except for the fact he was taking Mirapex," we don't
13 know that. What we know is, is that he was taking affirmative
14 steps between 2007 and 2013 or '14, whenever we did the search
15 warrant, to not only maintain child pornography, to find it, to
16 use different types of file sharing programs that would hasten
17 his ability to get child pornography, and that then he was
18 keeping it. That's what the evidence shows. Now, I agree with
19 you. You may say what point in time that occurs. I'm just
20 telling you that at the point in time between 2007 and 2014, you
21 even indicate that he knows what he's doing during that period of
22 time is wrong. And if that's true, that he knew what he was
23 doing was wrong, then there had to be some type of other event
24 that occurs. I mean, he has -- I mean, why wouldn't you
25 tell -- my point of view is, why wouldn't you tell the doctors?

1 Why wouldn't -- when the doctor's asking you whatever's
2 happening, you would say it. Now, you may disagree with that. I
3 understand that. I'm just saying that that is my contention.

4 THE COURT: Sure.

5 MR. RUSSELL: For purposes of a variance, you not only
6 have to look at what occurred at the start, but what occurred
7 during that period of time.

8 THE COURT: And I --

9 MR. RUSSELL: And the idea that you're saying, "Well,
10 he showed no evidence before this." Judge, we have had so many
11 cases in this district of child pornographers that we don't have
12 any clue about anything they do until the time that we actually
13 catch them.

14 THE COURT: Yeah, but we have 50 years of his life in
15 front of us that is entirely exemplary. If you want to talk
16 about other cases, let's do that. You tell me anybody we've had
17 in here who's had life experiences similar to Dr. Benz, who's
18 lived a life as exemplary as he has. Nobody.

19 MR. RUSSELL: James Haugh.

20 THE COURT: Who?

21 MR. RUSSELL: James Haugh.

22 THE COURT: Who's James Haugh?

23 MR. RUSSELL: That was a Judge Gerrard case. James
24 Haugh was a lifetime life insurance salesman, had a great job in
25 Grand Island --

1 THE COURT: He didn't take Mirapex.

2 MR. RUSSELL: He didn't take Mirapex, I grant you that,
3 but he had an exemplary life, no problems. We find him with
4 child pornography.

5 THE COURT: No, that's my point. With the Mirapex, if
6 you've got 50 years of behavior that is entirely legal, and then
7 the guy starts taking this drug that the FDA requires them to
8 warn about its potential, it's really hard for me to think that
9 the fact that he continues to -- the fact that his inhibitions
10 continue to be reduced does not suggest -- I guess the simplest
11 way to say it, I think this case is so unique, I've not had
12 anything closely resembling it.

13 MR. RUSSELL: I don't disagree with that, Your Honor.
14 I really don't. I'm not -- that's not my point. My point is, is
15 that when the Court looks at a variance to this degree, I don't
16 believe that a variance to this degree is warranted.

17 THE COURT: Sure.

18 MR. RUSSELL: And I would -- it is not my intention
19 here -- I am trying to show deference to the Court. I'm trying
20 to be as respectful as I can --

21 THE COURT: You are.

22 MR. RUSSELL: -- and I'm not trying to argue with you.
23 I'm just trying to indicate what the Government's position is
24 with respect to why we believe that a variance --

25 THE COURT: Sure.

1 MR. RUSSELL: -- is not -- either not warranted in this
2 case or certainly not to the degree that the Court is indicating,
3 and I'll leave it at that.

4 THE COURT: Are there any -- I don't mean this to wave
5 a red flag in front of a bull, but are there any other 3553(a)
6 things you want me to especially consider?

7 MR. RUSSELL: Well, I think the Court is -- I also
8 don't want to raise the red flag either, Your Honor. I think the
9 Court is incorrect in the adequate deterrence. I believe that we
10 really don't know about specific deterrence here, because Mr.
11 Benz was found and arrested at a time when he was taking Mirapex.
12 So, we don't know what his future conduct is going to be. I do
13 believe that specific deterrence is important in this case, but I
14 also believe that general deterrence is important, that
15 you -- that if, when you come into a court, when you want to
16 argue things like this and you want to take this to a trial on
17 both a receipt and a possession charge, I believe you should be
18 found -- you should be sentenced on the receipt. And, because of
19 that, I believe that a five-year sentence is warranted at a
20 minimum. I believe that for general deterrence as well. I grant
21 you this is a unique case, Your Honor. I understand all the
22 arguments that you've already made about that. I simply do not
23 believe that general deterrence is being served with a
24 probationary sentence.

25 With respect to the -- providing any medical care, I think

1 that medical care can be provided by the Department -- the Bureau
2 of Prisons. I don't -- I mean, with respect to future crimes,
3 again, that's already been addressed. I don't really need to do
4 that. So, with those statements, I think I'm done. So, thank
5 you.

6 THE COURT: Thank you. Mr. Russell, we've known each
7 other long enough to know that there's virtually nothing you
8 could do to offend me. You're always respectful, and you're
9 passionate, and you're zealous, and that is as it should be.

10 Mr. Creager?

11 MR. CREAGER: I hardly to know where to start and maybe
12 that's an indication that I shouldn't start at all. But when you
13 tell the story of Mr. Benz from where he was to where he is,
14 sitting next to me as a convicted sex offender in possession of
15 child pornography, lost his job, his tenured position over this,
16 to be arguing these fairly intricate arguments about what Mirapex
17 did or didn't do just is strange. Because I agree, everybody,
18 perhaps except Mr. Russell, agrees that the drug caused us to be
19 here. And I will tell you this. I was skeptical at first. "The
20 drugs made me do it." Yeah, I've heard that. "The alcohol made
21 me do it." Yeah. "My anger made me do it." Everybody has sort
22 of an excuse that something else made me do it and we lawyers
23 say, "Yeah, we've heard everything at least once and sometimes
24 twice," and we know what works and doesn't work. But then Dr.
25 Newring chimes in and he starts to say, "Hey, I'm skeptical,

1 too." But, as you look at the study, it took a while for the
2 pharmaceutical industry to figure out what they had created when
3 they created Mirapex. And there's other drugs like it. It's not
4 just Mirapex. And my recollection of the timeline was simply
5 that when they gave this drug to him, there were no warnings. He
6 was given no warnings. The doctors didn't have warnings. I
7 think the warnings came about much later, maybe -- I think your
8 Court's Exhibit whatever -- I forgot the number -- you look now
9 and the warnings are everywhere. But the carnage that preceded
10 the warnings was remarkable. And the studies that Dr. Newring
11 talked about became so overwhelming and they're general
12 acceptance in the pharmaceutical/psychological community that
13 finally Mirapex stopped defending its own drug and puts this
14 warning out that it causes normal people do to crazy things. I
15 think it's fair to Mr. Russell to say it causes crazy people to
16 do crazier things, but that doesn't mean it doesn't cause people
17 that really have no penchent -- and let's talk about that. When
18 I wake up every morning, the first thing I say to myself is, "You
19 know, I'm not going to kill anybody today, because I might go to
20 prison." There are people that probably get up in the morning
21 and say, "I'm not going to do something illegal, because I'm
22 going to go to prison." We naturally moderate our conduct, our
23 own psychological balancing. When I decide to speed on my way to
24 court because I'm late, I can decide to speed or not. "Well, I
25 won't speed, because I'll get" -- we do this all the time. And

1 some people have a better handle on making those judgments than
2 others. Right down the line, others kind of veer off course from
3 time-to-time, basically -- but they're in the line and there's
4 just people way off in the weeds. Dr. Benz didn't have any
5 trouble with the line. Dr. Benz was a rock star professor. He
6 was everything that I think, as a young child, if he'd grown up
7 to be the Dr. Benz that was there, he'd have been proud of
8 himself. His family was proud of himself. And then, boom, off
9 the cliff he goes.

10 I believe, honestly -- and we had this debate and I lost it
11 round one, I don't think it is irrelevant that what he was doing
12 was affected by a drug that made him do things that he wouldn't
13 otherwise have done. I call that diminished capacity. The Court
14 calls it, sort of, insanity. But let me ask this question. If
15 somebody held a gun to his head and said, "Download child
16 pornography or I'm going to shoot," is that a voluntary act? I
17 know it's wrong, but what's making me do it is some outside
18 influence over which I have no control. And, to me, Mirapex was
19 the metaphorical gun held to his head that was making him do
20 things, and the things that moderate conduct, "Should I do it?
21 Should I not do it? Am I going to get in trouble? Am I not
22 going to get in trouble?" Those were gone. The Mirapex
23 effectively tipped the balance in favor of, "Just do whatever
24 your brain is telling you to do." There isn't that thing in
25 psychology, I guess, that -- that DNA in our brain that wants us

1 to comply with rules. I wish I could've been successful on this
2 first phase of this case and gone to a jury and tell them his
3 story. They might have said he's not guilty of anything. But
4 we'll have that battle as to whether this is a specific-intent
5 crime, a general-intent crime, whether the evidence should've
6 been considered for that purpose or not. That's baked into the
7 cake. But even the State's -- the Government's expert really
8 didn't dispute Dr. Newring at the core. There were little
9 changes around the wording, around the edges, but even the
10 Government's expert understood that Dr. Benz was acting in
11 response to whatever chemically induced behavioral changes
12 Mirapex caused, and that just seems so clear to me that I don't
13 even know why we're debating.

14 If you take that away, if you take --

15 THE COURT: I think what Mr. Russell is -- and I don't
16 want to speak for him -- but I think he's saying, "Remember,
17 Kopf, you found that he" -- well, let's --

18 MR. CREAGER: You found that I failed on insanity
19 because he did things that suggested he knew it was wrong and
20 the -- and isn't the -- I had to prove by clear and convincing
21 evidence that -- or we had to establish by clear and convincing
22 evidence that that component of the insanity defense had to exist
23 for him to be found not responsible by reason of insanity.

24 THE COURT: Well, I found that there was a mental
25 defect.

1 MR. CREAGER: Yes. And --

2 THE COURT: And then I found that there are -- as the
3 Seventh Circuit has articulated, there are three ways of knowing
4 something is wrong. Subjectively, your client did not believe
5 what he was doing was wrong because he -- because, in his state
6 of mind, he was searching for someone who had harmed him and his
7 sister. And he thought that his behavior was, therefore,
8 justified.

9 MR. CREAGER: Justified, yes.

10 THE COURT: That's the -- that's one way of looking at
11 the statute. Virtually, no court has said that that's insanity.
12 You either -- well, there are two other tests and it doesn't
13 matter which one we apply here. He met them because he
14 recognized, I found, that what he was doing, even though he
15 thought it was morally justified, he hid from others. And that
16 suggested to me that you couldn't prove up - you failed to prove
17 up -- we're doing lawyer talk now, this is not a criticism -- on
18 the second element of the insanity defense. Go ahead.

19 MR. CREAGER: And so, in the end, I suppose a variance
20 off the guidelines are just that; guidelines. There are
21 sentencing purposes in the statute, and there are typically the
22 hard-fact cases, where you really can't look and find anything
23 like it anywhere. And I tried. I think, even in the preliminary
24 days, I'm arguing with the Court about where this evidence fits
25 on the continuum from irrelevant, to diminished capacity, to

1 insanity. I couldn't find anything where this convergence of
2 facts and circumstances, and drugs, and drugs at a time when it
3 was unknown that it caused these side effects, to compare it to.
4 But I think it's more appropriate to look at Dr. Benz as if he
5 was forced to do something against his will, rather than doing
6 something in furtherance of his will. In other words --

7 THE COURT: Well, that sort of used to be the law until
8 a crazy guy shot President Reagan and then the law was changed.

9 MR. CREAGER: Yes. And if there's anything in my
10 judgment that's not adequately factored into the guidelines or
11 into the vari- -- or the departure issues that normally accompany
12 the guidelines -- we just went right to variance. We didn't go
13 through departure because I think it's all basically one and the
14 same at this point. Dr. Benz, sitting here, didn't commit this
15 offense. It's just that simple. Something happened that the law
16 needs to deal with, and if the law can't excuse him, if the law
17 can't say that, "We understand that what you did was totally out
18 of character, and it wasn't even anything that you did because
19 you were mad, you were angry, you were pissed off, you were
20 depressed." I mean, "We are -- you did something because
21 somebody gave you something that they didn't understand would
22 cause you to do things." Where in the guidelines do we find
23 that? We don't. Where, in the case law, do we find discussions
24 about just how unusual that is? I think probably it's a
25 once-in-a-lifetime case and this may be it. Because, unless

1 there's somebody in the pipeline, I think the warnings are out
2 there. I think those people will now understand more carefully
3 and look out for these changes in personality, go back to
4 doctors. They will now recognize that, "Oh, my gosh" -- and Mr.
5 Russell is wrong about one thing. Dr. Newring's opinion became
6 much more persuasive, at least to me and perhaps to the Court,
7 when he said we actually saw the change in the effect that Mr.
8 Russell says we didn't get to see. He either ran out of it or
9 stopped taking it for a period of time and his wife testified
10 that there was -- in a short period of time, the old Joe was
11 coming back, but the desire to get him back on the medication to
12 treat the condition overcame whatever signals there were, and he
13 went back to being the troubled Joe. So, my recollection is, Dr.
14 Newring says that is gold. You actually have a period of time in
15 which we were able to evaluate Joe's character, personality
16 issues, when he was off the drug and the history was pretty clear
17 that those traits, the Joe that disappeared, came back. So, he
18 was even more persuaded that Mirapex was at the core of the
19 conduct simply because he had an opportunity to see in real time
20 Mr. Russell's argument that, "Well, we don't know what would
21 happen after he came off the Mirapex, whether he would've still
22 been involved in child pornography." It's an interesting
23 argument, but Dr. Newring basically, I think, closed that door
24 when he said, "Look. I actually have evidence here that the old
25 Joe came back."

1 And then, of course, I think his testimony was also that
2 there was a time after that, before he was indicted or charged,
3 that when he went off the drug, he was better, and then, on
4 into -- maybe it was after the indictment. But you heard the
5 testimony from the family member, the re-emergence of Joe Benz,
6 the rock star college professor, came back. So, Mr. Russell
7 thinks putting him in prison for 32 months serves some deterrent.
8 I don't know who it's going to deter. It's not -- Mr. Benz
9 couldn't have been deterred under those circumstances because he
10 wouldn't have been able to understand the deterrent value of it
11 because his whole psychological mental frame of mind was warped
12 by a drug. I don't know that there's anybody else out there that
13 would -- that could be deterred, and what punishment does he
14 deserve at this point that he hasn't suffered from the collapse
15 of life as he knows it?

16 So, when you look at the purposes under 3553 of sentencing,
17 he suffered enough. The law did not serve him well, generally
18 speaking. We're trying to get to a just result. I don't know
19 why the Government couldn't have taken some of this into
20 consideration. We tried to resolve it. I took a big gamble,
21 didn't I? I took a huge gamble going to trial, not taking a
22 plea, all the stuff that comes along with it, because there are
23 significant legal questions here. But where we are right now
24 today, based upon the evidence adduced at the trial, based upon
25 the Court's findings, your proposed variance, whether it was mine

1 or the one set forth in the presentence to Probation, makes
2 perfect sense, and it may be the only just sentence that could be
3 imposed in this case. I think you're 100 percent right on;
4 that's what should happen. Probation seems entirely appropriate
5 through variance, departure, or whatever mechanism that gets
6 there. And he'll figure out how to live the rest of his life as
7 a felon and a registered sex offender.

8 THE COURT: Thank you.

9 Dr. Benz, you have the right to speak before I sentence you.
10 You're not obligated to speak, but you certainly may if you wish.
11 Would you like to say anything?

12 THE DEFENDANT: Your Honor, no, thank you.

13 THE COURT: Alright. After considering all the
14 statutory goals of sentencing and the advisory sentencing
15 guidelines, I impose five years of probation and vary downward on
16 my own motion to probation. I do so because of the defendant's
17 physical condition and due to the fact that I am persuaded that
18 the offense would not have occurred but for the prescription drug
19 Mirapex the defendant was taking as a result of his multiple
20 sclerosis and the associated symptoms of restless leg syndrome.
21 The defendant's affliction is an unpredictable and disabling
22 disease of the central nervous system that confines the defendant
23 to a wheelchair or requires the use of leg braces and other
24 assistive devices.

25 In addition to the standard conditions of probation, the

1 following special conditions are imposed and they are set forth
2 in the sentencing summary that I will mark as Court's Exhibit 2,
3 and counsel have had an opportunity to review that, I believe.

4 MR. RUSSELL: Yes, Your Honor.

5 MR. CREAGER: Yes, Judge.

6 THE COURT: Insofar as restitution is requested, and
7 following the case of U.S. against Fast, F-a-s-t, a case that I
8 decided, I award Vicky restitution in the sum of \$3,333; Sarah,
9 \$3,333; and Casseaopeia, \$3,333. The total, then, is \$9,999 to
10 be paid during the term of probation as set forth in the special
11 conditions. I do not impose a fine largely because it would
12 interfere with the defendant's requirement of restitution, and I
13 do require that he pay the \$100 mandatory special assessment.

14 Counsel, that is my judgment and sentence. Do you have any
15 questions about it?

16 MR. RUSSELL: No, Your Honor.

17 MR. CREAGER: Nothing further, Judge. Thank you.

18 THE COURT: Do you want any further elaboration of my
19 statement of reasons?

20 MR. RUSSELL: No, Your Honor.

21 MR. CREAGER: No, Judge.

22 THE COURT: Alright. Dr. Benz, it's my obligation to
23 tell you of your right to appeal. Appeal means to have a higher
24 Court review what I've done. That higher Court is in St. Louis.
25 It's called the U.S. Court of Appeals for the Eighth Circuit. If

1 you file a notice of appeal within 14 days of today's date, that
2 higher Court will review my handling of this case, but it's got
3 to be filed, the so-called notice of appeal, within 14 days of
4 today's date. It's not hard to do. You can write on a piece of
5 paper, "I want to appeal," and file it in the court file. Your
6 superb lawyer, Mr. Creager, will do that for you if you instruct
7 him to. He must. And the lady who sits in front of me here, the
8 court clerk, will do it for you if you tell her to. The
9 important point is, it's got to be done within 14 days of today's
10 date or you lose your right to appeal. In a moment, we will
11 adjourn these proceedings and then the court clerk will give you
12 a piece of paper that summarizes your appeal rights. It is at
13 that time that you may speak with her and tell her to file a
14 notice of appeal and, if you do, she will.

15 Do you have any questions about your right to appeal, sir?

16 THE DEFENDANT: No, Your Honor. Thank you.

17 THE COURT: This is me personally. In my view, this
18 case is -- and I'm not being critical of the Government -- this
19 case is an utter tragedy. And I think maybe Mr. Creager's right;
20 there are some times when the law is an ass and this might be one
21 of them. We stand in recess.

22 (Recessed at 1:28 p.m.)

23 - - -
24
25

C E R T I F I C A T E

I, Lori J. Sehnert, court-approved transcriber, certify that the foregoing is an accurate transcript from the official digital sound recording provided to me of the proceedings made in the above-entitled matter.

s/Lori J. Sehnert DATE: October 17, 2016

Signature of Approved Transcriber

- - -

INDEX

<u>GOVERNMENT EXHIBITS:</u>	<u>Offered</u>	<u>Received</u>
1. Restitution Request from	12	12
Victim Jessica		
(Restricted Document)		
2. Sentencing Summary	37	37
(Restricted Document)		